

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2012090744

v.

VICTOR VALLEY UNION HIGH SCHOOL
DISTRICT,

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2012070653

v.

VICTOR VALLEY UNION HIGH SCHOOL
DISTRICT

ORDER GRANTING STUDENT'S
REQUEST FOR DISMISSAL

On March 6, 2013, the Pre Hearing Conference PHC was held. Parent represented Student. Jack Clarke and Michelle Jordan, Attorneys at Law, represented Victor Valley Union High School District (District). In the PHC Order, the ALJ organized and consolidated 109 issues by timelines into issues (A) 1 through 28; (B) 1 through 5; (C) 1 through 4; (D) 1 through 6; (E) 1 through 8; F 1; (G) 1 through 3; (H) 1; (I) 1; (J) 1; (K) 1 through 4; and (L) 1. Of those issues, many were dismissed by the parent at the PHC, by ALJ Myers-Cregar at the PHC, and by ALJ Castillo by motion. Those issues were dismissed with prejudice, as set forth in the PHC Order.

The due process hearing was held on March 18, 19, 20, and 21, 2013. During each day of hearing, the ALJ sought clarification from Parent regarding the issues she raised in her consolidated complaints. Parent clarified the issues and requested to dismiss many issues.

On March 20, 2013, Parent represented that the consolidated issue statement accurately represented the issues she raised, and she signed it. It was admitted into evidence as Student's Exhibit 66, and is set forth below in italics:

During the March 6, 2013 PHC, the parties extensively discussed and clarified the 109 issues parent raised in her consolidated complaints. The ALJ issued a PHC order which organized those issues into timelines, consolidated duplicative issues, and dismissed other issues under the doctrine of res judicata.

During the Due Process Hearing on March 18, 19, and 20, the ALJ clarified the issues with parent and documented several revisions to parent's issues during the Due Process Hearing. Parent moved to dismiss additional issues.

Parent represents that her consolidated issues for hearing are as follows:

- 1) Whether District denied Student a FAPE by not implementing ALJ Lehrman's Order on April 10, 11, and 12, 2012, including placement, accommodations, and modifications, including not providing Student with coursework, homework, a daily parent communication logbook with updates on his functional behavior, a clean cadet corps uniform which fit him, Alphasmart software and a portable keyboard, and by not discussing what accommodations were provided to Student during the May 4 and May 24, 2012 IEPs.*
- 2) Whether District denied Student a FAPE during the May 4 and 24, 2012 IEPs when developing goals and objectives, and instead used old data and information, and did not consider parent concerns that Student required a current academic assessment.*
- 3) Whether District's placement offer at the May 24, 2012 IEP denied Student a FAPE and was inappropriate, in spite of ALJ Lehrman's Order, because Student required independent study, a charter school, an on-line school, educational therapy, tutoring, coursework, homework, a daily parent communication logbook with updates on his functional behavior, an after school program with accommodations and an aide, and career training; Whether District's offer of Student's home school offered was inappropriate due to violence; and Whether District denied Student a FAPE because it didn't consider parent concerns and didn't discuss all available placements.*
- 4) Whether District denied Student a FAPE during April 10, 11, and 12, 2012, by using the CIBA- Leafwing NPA aide provider which Parent did not like because they did not provide her with the daily parent communication log book she wanted.*
- 5) Whether District denied Student a FAPE when it disenrolled him from its school after parent privately placed him in May 2012; Whether District denied Student a FAPE because it did not allow Student to be enrolled at the District and also at private Christian independent study home school; and Whether District denied Student a FAPE when it did not provide related services for Student's private Christian independent study home school placement; and Whether Student is entitled to compensatory education for the unilateral private placement at a Christian independent study home school.*

6) *Whether District denied Student a FAPE by not implementing ESY for 2012.*

7) *Whether District denied Student a FAPE by not providing 98 hours of tutoring pursuant to his April 18, 2011 IEP.*

8) *Whether District denied Student a FAPE between January 2012 and March 2012 by failing to give Student homework and schoolwork assignments.*

The ALJ dismissed the following issue, under res judicata, based on ALJ Garrett's Stay Put Order and ALJ Lerhman's final Decision and Order.

1) *Whether District denied Student a FAPE when it did not provide an NPA aide, and Student could not attend school from August 22, 2011 through March 26, 2012.*

Parent agreed to these issues, and the consolidated issue statement was admitted into evidence as Student's Exhibit 66. Consistent with the PHC Order of March 6, 2013, all issues which were dismissed by the parent and the ALJ are dismissed with prejudice.

During the four days of hearing, Parent called and examined seven witnesses, from the District and a non-public agency; and District called and examined one additional witness from the District. Four of Parent's Exhibits were admitted, and 14 of District's Exhibits were admitted.

On March 21, 2013, the fourth and final day of hearing, District brought an oral motion to dismiss Student's complaint with prejudice, alleging that the issues were compliance complaint issues properly within the jurisdiction of CDE and OCR, and that Parent's compliance complaints been addressed by CDE and OCR with a finding that District was in compliance. District alleged that Parent was also circumventing the orders and Decisions of ALJs Garrett and Lehrman, which set forth specific remedies and stay put orders, and which were not appealed. District further alleged that the complaint was frivolous, and unreasonable, because the original 109 issues, later, consolidated to 8 issues, were not properly brought under the IDEA. District alleged that Parent brought numerous complaints, and that her pattern of filing complaints such as this one was an abuse of process, unreasonable, without foundation, and brought for the purpose of harassment, causing unnecessary delay, and to increase the costs of litigation.

Specifically, as to Issue 1, District argued that it substantially complied with ALJ Lehrman's order, and was found in compliance by both CDE and OCR.

As to Issue 2, District argued that it used ALJ Lehrman's order and Parent's input for Student's present levels of performance and goals, and that Parent refused to give consent to a more current academic assessment.

As to Issue 3, District argued that it complied with ALJ Lehrman's order, and the CDE and OCR also determined it was in compliance.

As to Issue 4, District argued that the daily parent communication logbook was not part of ALJ Lehrman's order, and that at the IEP meeting of May 4 and May 24, the non-public agency behavior intervention supervisor discussed how Student exhibited maladaptive behavior when the daily parent communication logbook was placed in his backpack.

As to Issue 5, District argued that as a matter of law, it should prevail, based on ALJ Lehrman's order that Student's home school, a comprehensive high school, was the appropriate placement, and it followed her order.

As to Issue 6, District argued it complied with ALJ Lehrman's order.

As to Issue 7, District argued that the 98 hours of tutoring was pursuant to the 2010 settlement agreement which expired, and not the April 18, 2011 IEP as alleged, and that Parent was well aware of this.

As to Issue 8, District argued that as a matter of law, it was not required to give student homework.

As to the Dismissed Issue 9, that the use of the District aide was pursuant to ALJ Garrett's August, 2011 stay put order, and that it followed her order

After oral argument on the issues, Parent requested a dismissal of Student's complaint in its entirety. She requested it be dismissed without prejudice. (Exhibit S-67)

In response, District requested that the dismissal be made with prejudice, and that OAH retain jurisdiction for appropriate further relief.

The ALJ told the parties that the hearing would not re-convene, that the matter would be dismissed, and that the ALJ would take the issue of dismissal with prejudice under submission.

APPLICABLE LAW AND ANALYSIS

Neither state or federal special education statutes or regulations nor the California Administrative Procedures Act specifically address requests to withdraw complaints, be it before, during, or after the commencement of a due process hearing. However, Code of Civil Procedure, section 581, et seq., addresses such motions in the context of state civil proceedings. Code of Civil Procedure, section 581, subdivision (c), states that a plaintiff may dismiss his or her complaint, or any portion of it, with or without prejudice prior to the actual commencement of trial. Code of Civil Procedure, section 581, subdivision (e), states that after the actual commencement of a trial, a court will dismiss a complaint, or any portion

of it, with prejudice upon a plaintiff's request, unless all parties consent to dismissal without prejudice or unless the court finds good cause for a dismissal without prejudice.

OAH has dismissed matters with prejudice where the party requesting due process has unreasonably prolonged the proceedings, only to seek dismissal without prejudice after the hearing has begun. (Student v. Irvine Unified School District (2012) Cal.Offc.Admin.Hrngs Case No. 2011110180; Student v. Poway Unified School District (2013) Cal.Offc.Admin.Hrngs Case No. 2012110589). There also are some analogous situations where OAH has denied a student's motion to withdraw an issue unilaterally after the case had been submitted (Student v. Moreno Valley Unified School District (2009) Cal.Offc.Admin.Hrngs Case No. 2008120285) or, in a case consolidated with a District's due process hearing request, permitted a student to withdraw her case on the first day of hearing, but only with prejudice (Rialto Unified School District v. Student (2006) Cal.Offc.Admin.Hrngs Case No. 2005090655.) OAH has also issued orders to show cause as to why a case should not be dismissed with prejudice for failure to prosecute. (See, for example, Student v. Castro Valley Unified School District, (2011) Cal.Offc.Admin.Hrngs Case No. 2011020888).

These examples demonstrate that it is appropriate to rely by analogy on Code of Civil Procedure, section 581, subdivision (e), which dictates that a matter may be dismissed with prejudice after the commencement of a hearing unless all parties agree to a dismissal without prejudice or unless there is good cause shown to support a dismissal without prejudice.

In this case, Student's consolidated due process hearings requests were filed not long after Student prevailed in a similarly lengthy due process hearing, which resulted in an OAH order detailing what a free appropriate public education would be for Student going forward. Student simultaneously pursued compliance complaints with the California Department of Education for some of the same issues in the instant filings and used a considerable amount of resources over many months, only to request dismissal after multiple days of hearing. Specifically, the fourth day of hearing was scheduled to begin, eight witnesses had testified, and numerous documents had been admitted into evidence. The Student called seven witnesses, and District called one, who were either District employees or whose appearances were facilitated by the District, enabling them to testify during the school day. In light of the significant commitment of time and resources to address the same overlapping issues as in the earlier due process hearing requests and/or Student's compliance complaints, dismissal with prejudice is warranted.

ORDER

1. The consolidated matters are dismissed with prejudice.
2. Student may not file further due process hearing requests on the same issues during the same time periods.

Dated: April 8, 2013

/s/

DEBORAH MYERS-CREGAR
Administrative Law Judge
Office of Administrative Hearings